

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE  
CORPORATION,

No. C-11-3339 EMC

Plaintiff,

**ORDER GRANTING PLAINTIFF'S  
MOTION TO STRIKE PORTIONS OF  
DEFENDANT'S ANSWER TO THE  
COMPLAINT**

v.

SANJAY SETHI,

(Docket No. 25)

Defendant.

Plaintiff's motion to strike portions of Defendant's answer to the complaint came on for hearing before the Court on December 19, 2011. Docket No. 25. For the reasons set forth below, the Court **GRANTS** Plaintiff's motion to transfer venue.

**I. FACTUAL & PROCEDURAL HISTORY**

Plaintiff Federal Deposit Insurance Company, acting as receiver for IndyMac Bank, F.S.B. ("IndyMac") and Bank United, F.S.B. ("Bank United"), brought this suit against Defendant Sanjay Sethi, doing business as On Time Appraisals. Plaintiff alleges that Defendant negligently prepared appraisals of property that IndyMac and Bank United relied upon in making mortgage financial transactions. Compl. ¶¶ 21-22, 53-55.

On July 19, 2007, IndyMac funded two mortgage loans for Ramin Sharaf, totaling \$855,000, for the purchase of real property in Tracy, California ("Sharaf Property"). Compl. ¶ 13. In making this loan, IndyMac relied on an April 2007 Uniform Residential Appraisal Report prepared by Defendant, which valued the Sharaf Property at \$900,000. Compl. ¶ 14. Defendant prepared the

1 appraisal pursuant to a contract with First Point Financial, and allegedly understood that the  
2 appraisal would be used by lenders in connection to funding mortgages. Compl. ¶¶ 15, 16. In  
3 preparing the appraisal, Defendant certified, acknowledged, and agreed that the appraisal was  
4 prepared in accordance with the requirements of the Uniform Standards of Professional Appraisal  
5 Practice, which requires basing the appraisal on comparable market data. Compl. ¶ 19. Plaintiffs  
6 allege that contrary to the Uniform Standards, Defendant overvalued the Sharaf Property by basing  
7 his appraisal on substantially larger properties, misrepresenting the location of the Sharaf Property,  
8 and ignoring comparable sales. Compl. ¶ 21. As a result of the negligent preparation and  
9 misrepresentation in the assessment, IndyMac allegedly suffered foreseeable damage of  
10 \$622,145.42.

11 Similarly, on August 29, 2007, Bank United funded a refinance mortgage loan for Adam  
12 Reyes, in the amount of \$506,000, on real property in Stockton, California (“Reyes Property”).  
13 Compl. ¶ 23. Bank United likewise relied on a May 2007 Uniform Residential Appraisal Report  
14 prepared by Defendant, who prepared the appraisal pursuant to a contract with First Financial Group  
15 on the understanding that the appraisal would be used by lenders in connection to making loans.  
16 Compl. ¶¶ 24, 25, 28. Although Defendant certified that the appraisal was prepared in accordance  
17 with the Uniform Standards, Defendant allegedly overvalued the property by basing his appraisal on  
18 substantially larger properties, misrepresenting the location of the Reyes Property, and ignoring  
19 comparable sales. Compl. ¶ 31. As a result of the negligent preparation and misrepresentation in the  
20 assessment, Bank United suffered an unknown amount of damages. Compl. ¶ 32.

21 Based on these appraisals, Plaintiff brought this suit, alleging breach of contract to a third  
22 party beneficiary and negligent misrepresentation. Defendant’s answer raised 14 affirmative  
23 defenses, including comparative negligence as to Plaintiff’s negligent misrepresentation claim.  
24 Answer ¶ 76.

## 25 II. DISCUSSION

### 26 A. Standard of Review

27 Under Federal Rule of Civil Procedure 12(f), a “court may strike from a pleading an  
28 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” A matter is

1 immaterial if it has no essential or important relationship to a claim for relief or defense, and is  
 2 impertinent if it does not pertain to or is not necessary to issues in question. *Whittlestone, Inc. v.*  
 3 *Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010). Ultimately, the purpose of a Rule 12(f) motion  
 4 “is to avoid the expenditure of time and money that must arise from litigating spurious issues by  
 5 dispensing with those issues prior to trial.” *Id.* at 973 (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d  
 6 1524, 1527 (9th Cir. 1993)).

7 B. Comparative Negligence as a Defense to Negligent Misrepresentation

8 In California, a plaintiff’s comparative negligence in relying on a defendant’s  
 9 misrepresentation is generally not a defense to misrepresentation. Where a defendant misrepresents  
 10 the facts and induces the plaintiff to rely on those misrepresentations, the defendant cannot assert  
 11 that the plaintiff’s “reliance was negligent unless plaintiff’s conduct, in the light of his intelligence  
 12 and information, is preposterous or irrational.” *Van Meter v. Bent Constr. Co.*, 46 Cal. 2d 588, 595  
 13 (1956). Thus, California does not recognize the defense of comparative negligence in negligent  
 14 misrepresentation cases, except where the plaintiff’s reliance reaches *Van Meter*’s “preposterous or  
 15 irrational” standard. *See* 5 Witkin, *Torts* § 819 (2005) (“In jurisdictions in which negligent  
 16 misrepresentation is considered a form of negligence governed by the rules of negligence liability,  
 17 comparative negligence would limit recovery. California, classifying the tort as a form of deceit,  
 18 does not recognize the defense in these cases.”); *Carroll v. Gava*, 98 Cal. App. 3d 892, 896; *FDIC v.*  
 19 *Warren*, No. C11-3260 CW, 2011 U.S. Dist. LEXIS 123489, at \*4 (N.D. Cal. Oct. 25, 2011).

20 Defendant argues that *Van Meter* is superceded by *Li v. Yellow Cab Co.*, which applied  
 21 comparative negligence to negligence cases.<sup>1</sup> *Opp.* at 2 (citing *Li v. Yellow Cab Co.*, 13 Cal. 3d 804,  
 22 826 (1975)). However, *Li* concerned negligence liability, whereas California recognizes  
 23 misrepresentation as a species of the tort of deceit, separate and distinct from negligence. *See Bily v.*  
 24 *Arthur Young & Co.*, 3 Cal. 4th 370, 407 (1992). This distinction between negligent  
 25 misrepresentation and negligence is justified by the respective policies behind misrepresentation and  
 26 comparative negligence. In *Carroll*, the court found that the modern of law of misrepresentation

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27  
 28 <sup>1</sup> Plaintiff does not dispute that *Van Meter v. Bent Construction Co.* applies to cases  
 involving intentional misrepresentation.

1 evolved from cases concerning deceit in business transactions. 98 Cal. App. 3d at 897. Because  
2 business transactions rely on:

3 the accuracy of information imparted in buying and selling, . . . the  
4 risk of falsity is on the one who makes a representation. This  
5 straightforward approach provides an essential predictability to parties  
6 in the multitude of everyday exchanges; comparative fault principles,  
designed to mitigate the often catastrophic consequences of personal  
injury, would only create unnecessary confusion and complexity in  
such transactions.

7 *Id.*

8 Defendant cites no case law that suggests otherwise. Defendant's citation of *Kohn v.*  
9 *Superior Court of San Mateo County* is distinguishable. At most, *Kohn* found that comparative fault  
10 principles applied to apportion fault as between joint tortfeasors who made misrepresentations to the  
11 plaintiff. 142 Cal. App. 3d 323, 326 (1983). The court did not find that comparative negligence is a  
12 defense to a negligent misrepresentation. Instead, it found that cases such as *Carroll* were  
13 inapposite because "*Carroll* stands for the proposition that as long as the plaintiff is not aware of the  
14 true state of facts his negligence in not ascertaining them will not be compared with the negligence  
15 of the defendant in making the misrepresentation." *Id.* at 331. Thus, *Kohn* does not support  
16 Defendant's proposition that comparative negligence is a defense to negligent misrepresentation.

17 In the instant case, Plaintiff moves to dismiss Defendant's eleventh affirmative defense,  
18 which states:

19 The damages sustained by plaintiff were either wholly or in part  
20 negligently caused by and/or the fault of persons, firms, corporations,  
21 or entities other than this answering defendant, and said negligence  
22 and/or fault, comparatively reduces the percentage of negligence  
23 and/or fault, if any, by this answering defendant. More specifically,  
24 Plaintiff's comparative negligence in the underwriting of the subject  
loan caused or contributed to Plaintiff's claimed damages relating to  
the approval of the subject loan. Additionally, Plaintiff relied on the  
acts and representations of the borrower(s) and/or mortgage broker to  
underwrite the loan and its damages are either in whole or in part  
negligently caused by the mortgage broker.

25 Answer ¶ 76. This defense does not allege that Plaintiff's reliance on Defendant's alleged  
26 misrepresentations was irrational or preposterous, and thus fails to meet the *Van Meter* standard.  
27 Accordingly, the Court strikes Defendant's eleventh affirmative defense, with leave to amend. This  
28 ruling does not affect Defendant's ability to assert and substantiate with evidence that Plaintiff's

1 negligence in *e.g.* relying on the acts and representations of third parties *other* than Defendant  
2 affects damages and causation.


3 **III. CONCLUSION**

4 For the reasons stated above, the Court **GRANTS** Plaintiff's motion to strike Defendant's  
5 eleventh affirmative defense with leave to amend within 30 days.

6 This order disposes of Docket No. 25.

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8 IT IS SO ORDERED.

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10 Dated: December 22, 2011

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12 EDWARD M. CHEN  
13 United States District Judge  
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